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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MAINE STATE TROOPERS ASSOCIATION,
APPELLANT

v.

STATE OF MAINE and JAMES TIERNEY,
APPELLEES

ON APPEAL FROM THE SUPREME
JUDICIAL COURT
OF THE STATE OF MAINE

JURISDICTIONAL STATEMENT

ATTORNEY FOR APPELLANT:

JOHN W. CHAPMAN
Richardson, Tyler & Troubh
465 Congress Street
Portland, Maine 04101
(207) 774-5821

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(a) **Questions Presented by Appeal.**

Maine's Solicitation By Law Enforcement Officers Act prohibits the sale of or attempt to sell any book, magazine or advertisement, when the sale benefits, is intended to benefit or is represented to be for the benefit of any Law Enforcement Association.[1] Exception is made for public guidebooks or handbooks containing historical reviews or descriptions of services. The enumerated acts are unlawful, regardless of whether the person performing the act is a law enforcement officer or not.

The issue is whether or not the Solicitation by Law Enforcement Officers Act (hereinafter the "Act") violates the First and Fourteenth Amendments to the United States Constitution.[2]

The second, and subsidiary question, is whether attorney's fees under 42 U.S.C. §1988 were improperly denied. Upon receiving the State's complaint pursuant to Maine's Unfair Trade Practices Act, the Maine State Troopers Association (hereinafter the "Association") filed a counterclaim for injunctive relief under 42 U.S.C. §1983. Despite the fact that declaratory relief was granted to the association by the Superior Court, the denial of a reasonable attorney's fee under §1988 was upheld.

(b) **Parties.**

All Parties To The Proceeding Below Are Contained In The Caption.

[1]Likewise, the Act prohibits any "solicitation" of money or property which similarly benefits any Law Enforcement Association.

[2]The Law Court held that the statute, in fact, interferes with First Amendment freedoms, but that compelling state interests exist which permit the interference. *State v. Maine State Troopers Association,* 491 A.2d 538, 542 (Me. 1985).

(c) **Table of Contents and Table of Authorities.**

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(d) **Reports of Opinions Below.**

The decision of the Maine Supreme Judicial Court, sitting as the Law Court, appears in West's Atlantic Reporter as *State v. Maine State Troopers Association,* 491 A.2d 538 (Me. 1985). This decision upheld the opinion of the Superior Court in *State v. Maine State Troopers Association,* an unreported decision in Kennebec County Superior Court, Docket No. CV 83-496, dated September 6, 1984.

(e) **Statement of Grounds of Jurisdiction.**

i. *Nature of Proceeding.*
This is an appeal from the Maine Supreme Judicial Court sitting as the Law Court (hereinafter, the Law Court).

ii. *Date of Judgment Below.*
Judgment was entered in this matter on April 18, 1985. The Notice of Appeal was filed May 13, 1985. The Notice of Appeal was filed with the Clerk of Courts for the Law Court.

iii. *Statutory Provision for Jurisdiction.*

Jurisdiction is based upon 28 U.S.C. §1257(2), since the issue below was whether the Act contravenes the United States Constitution, and the decision was in favor of the Act's validity.

(f) **Constitutional Provisions, Statutes and Regulations.**

As permitted by the Rule, the provisions involved shall be cited at this section, with pertinent text included in the appendix.

U.S. CONST., amend. I
U.S. CONST., amend XIV §1
42 U.S.C. §1983
42 U.S.C. §1988
28 U.S.C. §1257
25 M.R.S.A. c. 403 (as amended 1983)

(g) **Statement of the Case.**

On October 25, 1983, the State of Maine, through the Attorney General's Office, filed a complaint for injunctive relief against the Association. This Complaint, pursuant to Maine's Unfair Trade Practices Act, cited the fact that the Association sold advertising in the 1983 volume of "The Maine Trooper", a quality publication edited and prepared by the Association. In its timely answer, the Association raised affirmative defenses of unconstitutionality, unclean hands and estoppel. The Association's counterclaim asserted the violation of the First and Fourteenth Amendments of the United States Constitution, and corresponding state constitutional guarantees. The Association requested injunctive relief and an award of an attorney's fee pursuant to 42 U.S.C. §1988.

On June 26, 1984, Defendant James Tierney, Attorney General of the State of Maine, was added as a party defendant.[3]

On July 31, 1984, a stipulation of the evidence was submitted to the Superior Court for the evidentiary basis of its decision. Significant in the evidence was the State's admission, via interrogatories, that it was aware of no complaints by any person based upon the activities of the Association. The only advertisers who testified stated that they themselves, subjectively, did not feel that they had been coerced in any way.

On September 6, the Superior Court rendered its opinion in the case.[4] It found that the magazine in question, "The Maine Trooper", is a quality publication designed to improve communication among members of the Maine State Troopers Association and to improve public understanding of the responsibilities facing Maine State Troopers. The Court also found that "[i]n soliciting advertising for their magazine, Maine State Troopers did not, in any way, engage in any form of coercion or otherwise use their official position to solicit advertising." The

[3]This was done by agreement of the parties, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

[4]The text of this decision appears separately in the Appendix.

Court noted that "it appears that advertising was developed largely as the result of personal friendships between individual troopers and prospective advertisers."

The Court also found that the Association hopes to continue publishing the magazine, and "to continue to utilize advertising, the revenues from advertising being *essential* to maintaining the quality level of the publication (emphasis added)."

The Superior Court's opinion did not grant injunctive relief, either to the Association or to the State. It found that, to the extent that the statute treated wardens[5] differently than other law enforcement officers, the Act would be unconstitutional, and imposed a requirement that the Association be permitted to advertise and sell magazines to the same extent as game wardens.

On September 12, 1984, the case was appealed to the Law Court. In its Brief, the Association again raised questions of unconstitutionality under the U.S. Constitution, and the issue of attorney's fees pursuant to 42 U.S.C. §1988.

The Law Court decided, in essence, that the state had sufficient interest in preventing an "intangible harm"[6] to deprive law enforcement associations, and others, of protected First Amendment rights. From that decision, the Association appeals.

(h) **Substantial Reasons for Plenary Consideration.**

Appellant suggests that the Court may, in its discretion, decide that plenary consideration is unnecessary *if and only if* summary reversal is appropriate. The Law Court, absent any evidence of actual or perceived coercion, apparently assumed

[5]Game wardens, in 1983, were granted more extensive rights of solicitation than other law enforcement officers, including limited rights to sell publications and advertise. The Superior Court characterized the 1983 legislation as "in response to a plea from a specialized group for a special privilege."

[6]*State v. Maine State Troopers Association*, at 491 A.2d 542. The "compelling" State interest cited is the interest of the State in the image of its law enforcement officers. However, in *State v. John W.*, 418 A.2d 1097 (Me. 1980), the Law Court struck down a juvenile's conviction for shouting obscenities to a policeman. The decision rested on First Amendment grounds, without note of the "image" interest.

the compelling state interest into existence based upon comments in the legislative history of the Act.

However, in the event that summary reversal is inappropriate, a plenary consideration of the case is necessary. First, it is likely the Court will want an opportunity for the parties to "flesh out" the record itself. The record on appeal to the Law Court comprises some 300 pages of evidence, documents and stipulated testimony.[7]

Second, plenary consideration is essential for examination of extensive, already-existing, statutory protection of the public from overreaching by law enforcement officers.

Third, the broad sweep of the State's alleged compelling interest, together with the Appellant's assertion of the "overbreadth doctrine"[8] suggests that the Court will find it useful to question counsel for the parties on specific factual situations. For instance, the Law Court has limited the Association to soliciting, as defined in the statute, among its members and their immediate families. Clearly, some larger group of persons may be solicited without coercion being inherent in the solicitation itself.[9]

Fourth, the statute itself also prohibits in essence, financial solicitation in any form by, or on behalf of, a law enforcement association. Police Benevolent Associations are made pariahs, different in status from every other association protected by the First Amendment. No one may attempt to benefit by such other material help from anyone else. This Court recently considered novel questions of the States' rights to forbid or limit solicitation protected by the First Amendment in *Secretary of State of*

[7]The record is, in the opinion of the Appellant, essential to an understanding by the Court of the specific issues in the case. A request may be made pursuant to U.S. Sup. Ct. Rule 13.1.

[8]From the outset, Appellant has asserted the overbreadth doctrine of *NAACA v. Button*, 371 U.S. 415 (1963).

[9]For example, the statute would prohibit a police union from requesting aid from another larger, more powerful police union on a matter of common concern. The danger of even a "bad appearance" to others is, obviously, slight.

Maryland v. Joseph H. Munson Co., 467 U.S. _____, 104 S. Ct. 826 (1984), and *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980). The Court may desire an opportunity to further examine and refine the constitutional case law relating to solicitation by advocacy organizations.

(i) **Appeal from District Court.**

This section is inapplicable.

Respectfully submitted,

JOHN W. CHAPMAN
Attorney for Appellant

(j) **Appendix.**

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OPINIONS AND FINDINGS BY COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3798
Law Docket No. Ken-84-349

STATE OF MAINE

v.

MAINE STATE TROOPERS ASSOCIATION

Argued - March 12, 1985
Decided - April 18, 1985

Before McKUSICK, C.J., and NICHOLS, VIOLETTE, WATHEN, GLASSMAN and SCOLNIK, J.J.

WATHEN, J.

Defendant Maine State Troopers Association (the "MSTA") appeals from a judgment of the Superior Court (Kennebec County) holding that the Solicitation by Law Enforcement Officers Law, 25 M.R.S.A. §3701 *et seq* (Supp. 1984-1985), constitutionally prohibits the solicitation of advertisements from the general public on behalf of law enforcement officers or law enforcement associations. The State cross-appeals from that portion of the Superior Court's judgment deciding that the State may not properly ban the sale or distribution to the general public of MSTA publications, nor impose greater restrictions on the manner of distribution than are imposed on publications issued by state game wardens. We find no error and deny the appeals.

I.

The MSTA is an organization composed of current and retired members of the Maine State Police. In 1981, the MSTA published the first issue of a magazine intended to improve the image of troopers among MSTA members and the public. "The Maine Trooper" was published annually in 1981, 1982, and 1983. Approximately 750 copies of Volume 1, 2,000 copies of Volume 2, and 1,000 copies of Volume 3 were published. Advertisements were solicited and placed in the 1982 and 1983 volumes, no advertisements were solicited or bought for the 1981 volume. Most copies of the magazine were distributed free of charge. For example, each Maine State Trooper and retiree received a free copy, as did advertisers, the Governor, and state police forces around the country. Of the total 3,000 copies of "The Maine Trooper" published in 1982 and 1983, fewer than 300 were sold.

The MSTA sought advertisements by means of letters, telephone calls, and in-person solicitations. The 1983 volume contains advertisements from a number of businesses, including towing services, garages, and law enforcement equipment companies. Included among companies that were solicited but declined to advertise are: Scott Paper, Pratt & Whitney, and Kawasaki. The Attorney General has received no complaints concerning the sale of advertising in "The Maine Trooper."

In the fall of 1983, the State brought this action under the Unfair Trade Practices Act, 5 M.R.S.A. §206 *et seq.* (1979 & Supp. 1984-1985), to enjoin permanently the MSTA from violating the Solicitation Law. The Solicitation Law prohibits any person from "solicit[ing] property from the general public when the property, or any part of it, in any way benefits, is intended to benefit or is represented to be for the benefit of any law enforcement officer, law enforcement agency or law enforcement association. . . . " *See* 25 M.R.S.A §3702. The complaint alleged that the MSTA sold and offered to sell advertisements for "The Maine Trooper," and that revenues from the sales of advertisements benefited the MSTA. Based on these allegations, the State requested the Superior Court to find that the MSTA

violated the Solicitation Law and the Unfair Trade Practices Act. The State also requested that the Superior Court permanently enjoin the MSTA and persons acting on its behalf from selling or offering to sell advertising to the general public for the benefit of the MSTA. In addition, the State requested that the MSTA be ordered to pay the costs of investigation.

The MSTA answered by denying a violation of section 3702 and by alleging that section 3702 is unconstitutional on its face and as applied. The MSTA sought to enjoin enforcement of section 3702 and sought reasonable attorney's fees pursuant to 42 U.S.C. §1988. The parties submitted the matter to the Superior Court on agreed upon testimony and joint exhibits. The Superior Court ruled that the restrictions on solicitation of advertising imposed by the Solicitation Law "are valid and enforceable against" the MSTA, "subject to the limited exceptions for solicitation of advertising allowed by the 'wardens' exception. . . . " The Superior Court ruled that the MSTA "may sell their publications to the general public subject to the same limits as are imposed on associations of State Wardens by 25 M.R.S.A. section 3702." In the view of the presiding justice, issuance of an injunction against either party was unnecessary because of the parties' commitment to uphold the law.

II.

The MSTA's first argument is that it has not solicited property from the general public. Section 3702 provides in part that:

> No person may solicit property from the general public when the property, or any part of it, in any way benefits, is intended to benefit or is represented to be for the benefit of any . . . law enforcement association.

The MSTA admits that it is a law enforcement association as defined in 25 M.R.S.A. §3701(2), and that it has solicited property within the meaning of the Solicitation Law, by selling or offering to sell advertising. *See* 25 M.R.S.A. §3701(5).

There is no dispute that the MSTA undertook its solicitations for its own benefit. The MSTA, however, denies that it has

solicited property from the general public, as required for a violation of section 3702. The Solicitation Law does not expressly define the phrase, "general public."

The MSTA contends that because it solicited mostly from businesses with which it or individual troopers had a personal relationship, the general public was not solicited. The MSTA, relying on two Law Court decisions, defines "public" as meaning every individual of the State as opposed to any single individual or group of individuals. *See, e.g., Merrill v. Maine Public Utilities Commission,* 154 Me. 38, 41, 141 A.2d 434, 435 (1958) (defining "public" for purposes of common carrier statute as referring to general public as distinguished from any individual or group of individuals); *Knight v. Thomas,* 93 Me. 494, 500, 45 A. 499, 501 (1900) ("public" defined as entire community, both taxpayers and non-taxpayers).

As used in section 3702, the phrase "general public" includes any member of the public other than members of the MSTA and their immediate families. The Solicitation Law, therefore, is applicable even though solicitation activities are limited to some individual member or identifiable group within the general public. Thus, the MSTA takes nothing by its contention that most of the solicitations were aimed at persons and businesses with whom the troopers already had a relationship. We conclude from the record that the Superior Court correctly found that the MSTA has solicited property from the "general public" as that phrase is used in section 3702.

The MSTA's second argument is that the Solicitation Law violates provisions of the Maine Constitution and the United States Constitution. At the core of the MSTA argument is the contention that section 3702 impermissibly infringes upon the MSTA's constitutionally protected right of free expression. *See* U.S. Const., amend. I, amend. XIV; Me. Const., art. I, §4, art. I, §15.

The MSTA accurately contends that solicitation activities are entitled to the protections of the freedom of speech provisions of the Maine Constitution and United States Constitution. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467

U.S. _____, _____, 104 S.Ct. 2839, 2849 (1984); *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 833-834 (1980). Of course, the freedom of speech is not absolute. The ultimate protection to be afforded the MSTA's solicitation activities depends in large measure upon the importance of the State's interest in regulating those activities.

As reported in the Solicitation Law's Statement of Fact, L.D. 664 (108th Legis. 1977), the Legislature's avowed purpose was "to prevent police officers and their agents from soliciting contributions from the general public for the benefit of a law enforcement agency or a benevolent association. Solicitation by a law enforcement agency is inherently coercive." Implicit in the recognition that law enforcement solicitation is inherently coercive, is the understanding that law enforcement solicitation erodes public confidence in the integrity of law enforcement personnel. The State's interest in protecting the reputation of its law enforcement bodies is undeniably substantial. Indeed, we would be hard pressed to suggest a weightier interest.

Because the Solicitation Law's prohibitions place a burden on the MSTA's fundamental rights, the State must show that the law can withstand strict scrutiny. *See Dunn v. Blumstein*, 405 U.S. 332, 336, 192 S.Ct. 995, 999 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 (1969). For a law to survive strict scrutiny, the State must demonstrate that the law is necessary to promote a compelling government interest. *See Association of Independent Professionals v. Maine Labor Relations Board*, 465 A.2d 401, 410 (Me. 1983); *Lambert v. Wentworth*, 423 A.2d 527, 532 (Me. 1980). The law must be narrowly drawn so that it is the least restrictive means of achieving the compelling government interest. *See Village of Schaumburg*, 440 U.S. at 636, 100 S.Ct. at 836; *Association of Independent Professionals*, 465 A.2d at 411.

The Superior Court found that there was no subjective intention on the part of the troopers to ask anyone to purchase advertising if they did not wish to do so. The MSTA reasons that because the act prohibits solicitation, even if the solicitation

does not involve a subjective intent to coerce, then it is clear that the act is not the least restrictive means of achieving the governmental interest. The MSTA errs in confining the governmental interest solely to the prohibition of solicitations involving a subjective intent to coerce. The act itself and the legislative history reveal two additional aspects of law enforcement solicitation that justify the breadth of the regulation. Although a police officer may not overtly attempt to coerce a prospective donor, the mere act of solicitation is inherently coercive. Because of the officer's position, the donor may not feel totally free to reject the request. Beyond any impact on the prospective donor, the appearance of the transaction to third persons, serves to undermine public confidence in the integrity of the public office. Accordingly, the subjective intent of the troopers and the absence of any complaint of coercion are irrelevant. The damage that the Legislature seeks to avoid is no less real merely because it is intangible. Because at least the appearance of coercion inheres in every solicitation on behalf of law enforcement agents, and because that appearance undermines the integrity of the office, the State has a compelling interest in regulating all law enforcement solicitation.

The MSTA's third argument is that the Solicitation Law is void because it prohibits protected, as well as unprotected conduct. The MSTA contends that the Solicitation Law is "overbroad" because it prohibits every solicitation of a member of the public. We do not consider this to be an appropriate case for application of the overbreadth doctrine. The Supreme Court has said that legislation is overbroad "if in its reach it prohibits constitutionally protected conduct." *See Grayned v. Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972). In *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3360 (1982), the Supreme Court explained that the "traditional rule is that a person to whom the statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." The Supreme Court identified the first amendment overbreadth doctrine as one of the few exceptions to the tradi-

tional rule. *See id* at 768-769, 102 S.Ct. at 3361. The First Amendment overbreadth doctrine permits "persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." (citations omitted). *See id.* The Court, however, has applied the doctrine "only as a last resort" and therefore the overbreadth must be "substantial" before a statute will be declared facially invalid. *See id.* Because the integrity of the State's law enforcement agents is cast in doubt with every solicitation on their behalf, the prohibition against soliciting the "general public" is not fatally overbroad.[1]

The MSTA's fourth argument is that the Solicitation Law is void for vagueness because it fails "[t]o provide reasonable and intelligible standards to guide the future conduct of individuals and to allow the court and enforcement officials to effectuate the legislative intent in applying these laws." *See Maine Real Estate Commission v. Kelby*, 360 A.2d 528, 531 (Me. 1976). The MSTA asserts that it has no way of knowing "what smaller category of persons may permissibly be solicited." Given the appearance of coercion and the potential effect on the public office involved in every solicitation for law enforcement personnel, permissible targets of MSTA solicitation are confined to its own membership and immediate family members.

Finally, the MSTA contends that the Solicitation Law is a significant deprivation of its right to use property, amounting to a taking of property without due process of law. The MSTA's contention is premised on the alleged indefiniteness of the phrase "general public." As explained above, however, the phrase is not indefinite. The MSTA's right to use its property has been adequately protected by the Legislature's adherence to due process.

[1]We decline to speculate on possible application of the statute to hypothetical transactions other than the sale of advertising and the sale of the magazine.

III.

Turning to the "wardens exception", in 1983, the Legislature amended section 3702 by adding the following to the prohibition on solicitation of property from the general public for the benefit of a law enforcement officer, agency, or association:

> except that any state warden service association may offer for sale, by persons other than wardens or members of the association, to members and the public guide books or handbooks containing historical reviews or descriptions of services, except that on the request of a nonmember the association may provide that person with the copies requested for sale by that person.

See P.L. 1983, c. 330. The amendment further provides that no advertisements can be sold or included in the publications, except complimentary statements from members or former members. In addition, the amendment directs that all proceeds from sales be expended "for direct charitable services to members [or their families] . . . and may not be used for buildings or equipment" or entertainment of members.

When the State permits one speaker to exercise a right to speak, the State cannot deny another speaker similar rights without substantial justification for differentiating between the speakers. *See Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S.Ct. 2286, 2292 (1972); U.S. Const., amend. XIV; Me. Const., art. I, §6-A. The Superior Court found no justification for treating the MSTA and game wardens differently in the context of solicitations. The State suggests that we eliminate the discrepancy by striking the "wardens exception" from the statute. The less restrictive treatment provided under the "wardens exception" is not rendered invalid because of the more restrictive provisions that apply to members of the MSTA. When a statute treats essentially identical speakers differently, it is the more restrictive treatment that must fall.

The record is devoid of a substantial justification for the statute's differing treatment of the MSTA and game wardens. In the absence of a demonstration of a substantial justification

for this discrepancy, we conclude that the Solicitation Law, as presently drafted, may not be applied to the MSTA more restrictively than it is applied to game wardens.

IV.

Finally, the MSTA requested that attorney's fees be awarded to it pursuant to 42 U.S.C. §1988. The Superior Court denied the request. Section 1988 allows a court, in its discretion, to award reasonable attorney's fees as part of the award of costs to a party prevailing in an action to enforce 42 U.S.C. §§1981, 1982, 1983, 1985, and 1986. The MSTA set forth the claims of unconstitutionality as an affirmative defense to the State's complaint. In addition, the MSTA filed a counterclaim asserting claims of unconstitutionality identical to those set forth as affirmative defenses. The MSTA's affirmative defense was sufficient to protect their civil rights. The counterclaim added nothing, therefore we disregard it and view the MSTA as a defendant for purposes of this litigation. In *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2, 103 S.Ct. 1933, 1937 n.2 (1983), the Supreme Court stated that a prevailing defendant "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." The record contains no substantial evidence that the State instituted suit for purposes of harassment or vexation.

The entry is:

Judgment affirmed.

All concurring.

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OPINIONS AND FINDINGS BY OTHER COURTS BELOW

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-83-496

STATE OF MAINE,

Plaintiff

vs.

OPINION and ORDER

MAINE STATE TROOPERS ASSOCIATION,

Defendant

This matter is before the Court on complaint by the State through the Department of the Attorney General against the Maine State Troopers Association alleging violation of the Solicitation by Law Enforcement Officers Law, 25 M.R.S.A. section 3701 through 3703. The action is brought under the Unfair Trade Practices Act, 5 M.R.S.A. section 206, as authorized by 25 M.R.S.A. section 3702. An injunction is sought pursuant to 5 M.R.S.A. section 209 restraining the Maine Troopers Association from violating the solicitation law.

Defendant Maine State Troopers Association has filed a counterclaim alleging that the Solicitation by Law Enforcement Officers Law is violative of both the State and Federal Constitutions.

The State's complaint is directed only to the activities of the Maine State Troopers Association in soliciting sales of advertisements for inclusion in their magazine "The Maine Trooper." However, the Troopers' counterclaim attacks the statute both because it limits the efforts of Association members to sell advertising and because it purports to limit the ability of the Association and its members to sell the magazine itself to members of the public.

The Act basically prohibits law enforcement officers or associations from soliciting from the general public, with soliciting defined to include "The sale of, offer or attempt to sell, any advertising, advertisements, advertising space, book, card, tag, coupon, ticket, device, magazine, membership, subscription or other tangible item or thing of value." 25 M.R.S.A. section 3701-5-C.

Facts

The basic facts are not in dispute, having been submitted to the Court by stipulation. The Maine State Troopers Association is an organization of members of the Maine State Police and thus a law enforcement association as that term is defined by 25 M.R.S.A. section 3701-2. Its members are law enforcement officers as defined in 25 M.R.S.A. section 3701-3.

The Maine State Troopers Association has published, and hopes to continue to publish, a magazine called: "The Maine Trooper." To date this magazine has been published annually in 1981, 1982 and 1983. The 1982 and 1983 editions of the magazine contained approximately 50 advertisements solicited by members of the Maine State Troopers Association from individuals and businesses. The stipulated evidence indicates that most of the advertisements were placed as a result of contacts between individual troopers and persons or businesses with whom the troopers were already familiar. However, there is no restriction on who may or may not advertise in "The Maine Trooper." In soliciting advertisements, which were paid advertisements, the members of the Association were soliciting property as that term is defined in 25 M.R.S.A. section 3701-5. The decision to solicit advertising from a wide range of businesses and individuals constituted a solicitation from the general public as that term is addressed in 25 M.R.S.A. section 3702.

The President of the Maine State Troopers Association testified that the Association directors were fully aware that members were violating section 3702 by soliciting ads for the 1982 and 1983 editions. However, he indicated that solicitation continued despite that knowledge because of the Board of Directors' belief that section 3702 was unconstitutional.

The "Maine Trooper" is a quality publication designed to improve communication among members of the Maine State Troopers Association and to improve public understanding of the responsibilities facing Maine State Troopers. In soliciting advertising for their magazine, Maine State Troopers did not, in any way, engage in any form of coercion or otherwise use their official position to solicit advertising. Instead, it appears that advertising was developed largely as a result of personal friendships between individual troopers and prospective advertisers.

The Maine State Troopers Association hopes to continue publishing "The Maine Trooper" and to continue to utilize advertising, the revenues from advertising being essential to maintaining the quality level of the publication. Further, the Maine State Troopers Association anticipates contracting with professional solicitors to significantly boost advertising revenues for future publications. Efforts to contract with professional solicitors have been delayed pending resolution of this litigation.

Discussion

Both parties agree that solicitation activities are entitled to the free speech protection provided in Article I, section 4 and the First Amendment of the United States Constitution, *Secretary of State of Maryland v. the Joseph H. Munson Co., Inc.*, ____ *U.S.* ____ 81 L.Ed.2d. 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). The defendants argue that, because of these protections, the act must fall, and trooper solicitation of advertising and magazine sales must be allowed to continue. Defendants also argue that the Solicitation by Law Enforcement Officers Law is invalid because it is vague and overly broad and because it deals unequally with the Maine State Troopers Association as compared with a similar organization of State Wardens.

Neither the cases cited above, nor any other cases of which the Court is aware, grant an unrestricted right of solicitation free of any restraints the State might seek to impose. Speech content or speaker status based restrictions on speech may be

imposed, but they must serve a compelling state interest, and they must be narrowly drawn to achieve the desired end, *Association of Independent Professionals v. Maine Labor Relations Board,* 465 A.2d 401, 410-412 (Me. 1983); *Equifax Services, Inc. v. Cohen,* 420 A.2d 189 (Me. 1980).

A law enforcement officer's job is created by the authority of the State. Likewise, by the authority of the State, law enforcement officers are vested with unique and significant discretionary powers which they may exercise over other citizens. It is not at all unreasonable, or violative of freedom of speech rights, that the State in vesting law enforcement officers with vast powers over members of the public, likewise demands some special restrictions on how those officers may deal with members of the public.

At the time of enactment of the Solicitation by Law Enforcement Officers Law there was great concern in the Legislature that solicitation of funds from the public by law enforcement officers, for activities to benefit their official functions or organizations, created subtle coercion to contribute, even if no coercion were expressed in the solicitation. The purpose of the legislation is well expressed in the legislative history of the law. The Statement of the Fact for the original legislative bill leading to the law, L.D. 664 (108th Legis. 1977) stated the purpose of the law:

> The purpose of this bill is to prevent police officers and their agents from soliciting contributions from the general public to raise money for the benefit of a law enforcement agency or a benevolent association. Solicitation by a law enforcement agency is inherently coercive. Even though no coercive statements are made during these solicitations, those citizens who are solicited feel that they have to contribute to remain on a friendly basis with the law enforcement agency which is responsible for protecting their property. There is an exception allowing elective law enforcement officers such as sheriffs to solicit campaign contributions.

During debate Representative Jackson addressed the subtle coercion concern:

> [I]t is very hard to refuse a man in uniform or a policeman when he comes selling tickets or raising money. There is, in many citizens' minds, a feeling of coercion that they have to give, the fear that maybe they will get a parking ticket if they don't, this type of thing. It may not be there, I don't think it is there, but the feeling does exist. Legis. Rec. House 2003 (1977).

Representative Clark echoed the same concerns in stating that "the fact remains, and the cases and statistics will verify this, that solicitations from people in the law enforcement field is inherently coercive." Legis. Rec. House 2004 (1977).

The remarks of the sponsor of L.D. 664, Representative Carroll of Limerick, further outlined the philosopy underlying the bill.

> Why do you think a local citizen would buy tickets to the policeman's ball? Because they enjoy dancing? Most will purchase such tickets to show that they support the police department, that they support the police department more than citizens who do not buy tickets. For the most part, purchasers of tickets do not intend to attend such events and will admit that they hope that in some future situation their support of the department will be taken into account when they have some law enforcement problem. Whether it is the motorist who buys a pair of tickets with future traffic summonses in mind, or the merchant who buys a whole book of tickets thinking of his customers' future parking violations, each is attempting to purchase in advance some type of preferential treatment. Whether or not the law enforcement agency will be involved in such favoritism is immaterial. The fact is that the public thinks that the agency will be involved in favoritism, and to put it simply, buying a ticket is buying a policeman. Legis. Rec. House 2043 (1977).

A major state interest, protection of the integrity of the exercise of state power by the state's agents, is evidently implicated by enactment of this law. Significantly, restriction on solicitation activities by law enforcement officers is not total. It is narrowly drawn, focused on solicitation for matters which benefit the law enforcement officer personally, a law enforcement agency, or a law enforcement association as those terms are defined in section 3701.[1] A law enforcement officer remains free to solicit for other activities—local fraternal organizations, youth sports teams and the like—if his relation to them is the same as any other member of the general public and not some relation created by his special, state created status as a law enforcement officer.

A State restriction on a law enforcement officer soliciting advertising for law enforcement officers, law enforcement agencies, or law enforcement associations, all of whose status is created by the special power of the State, and the officer's relationship to that special power, is a legitimate legislative act to assure the power and authority bestowed by the State will not be abused. It is a restriction which, though significantly compromising normal free speech rights, is developed to protect a significant state interest, and it meets the test set by the Law Court in that the restriction on advertising solicitation is narrowly drawn to protect that state interest. Such a restriction is not violative of the rights of freedom of speech, freedom of association, or freedom of the press guaranteed by the First Amendment of the United States Constitution and Article I, section 4 of the Maine Constitution.

[1]The ban solicitation of advertising in section 3702 extends to law enforcement officers and others acting for them, including professional fundraisers such as the troopers plan to hire. This restriction is appropriate because even sales by third persons may carry a subtle impression of coercion. First those solicited may believe that word of their decision to advertise or not to advertise may be reported to association members. Second, publication of advertisements will necessarily demonstrate who chose to advertise and may influence those seeking to curry favor with state law enforcers.

To prevail on an overbreadth claim, "substantial overbreadth" must be demonstrated, it is not enough just to show some possibility of impermissible application. If the statute generally covers a whole range of easily identifiable proscribable conduct, it will be upheld against an overbreadth challenge despite possibilities of misapplication, *CSC v. Letter Carriers,* 413 U.S. 548, 580-581, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *see also Secretary of State of Maryland v. Joseph H. Munson Co., Inc., supra,* 81 C.Fed.2d at 801.

Where the purposes and provisions of a statute are generally within constitutional limits, the burden is on the challenger to demonstrate that the statute, as applied to the challenger, is constitutionally deficient, *New York v. Ferber,* 458 U.S. 747, 774, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982). The statute at issue here imposes a broad prohibition, but it is not constitutionally overbroad. Law enforcement officers have tremendous power, the breadth of protection enacted by the antisoliciting statute is correspondingly broad. Likewise, the Court sees no problem with vagueness, what is prohibited is well defined in 25 M.R.S.A. section 3701-5.[2] Thus the State may properly enforce the statutory advertising restrictions against the defendant and its members.

[2]Section 3702 prohibits soliciting property from the general public. Soliciting is defined in section 3701-5 as follows:

> "Solicit" means to request property. The word means and includes, but is not limited to, the following methods of securing property:
>
> A. Any verbal request, including, but not limited to, a request that is made in person, by telephone or through any advertising media;
>
> B. Any written request, including, but not limited to, a request that is sent, delivered or distributed or any advertisement posted in a public place or appearing in a newspaper, television or other advertising media; and
>
> C. The sale of, offer or attempt to sell, any advertising, advertisements, advertising space, book, card, tag, coupon, ticket, device, magazine, membership, subscription or other tangible item or thing of value.

The impact of the prohibitions in the antisoliciting law on efforts which defendants might wish to undertake to sell the magazine or any other publication is more troubling. As indicated above, one of the purposes of the "Maine Trooper" is to improve public understanding of the activities of Maine State Troopers. Efforts by an organization of Maine State Troopers to improve public understanding are entitled to Article I section 4 and First Amendment protections. The evidence indicates that, at least as with regards to issues 2 and 3, the selling price of the magazine did not match costs of publication, let alone any costs that might be incident to distribution. Thus, when the public pays for the magazine, it pays only for the message, it makes no additional contribution to the organization. Further, while the "Maine Trooper" is called a magazine, it is in more general terms a "publication." Broadly construed it might also be called a "guidebook" or a "handbook" with "historical reviews" and "descriptions of services." In fact, historical articles and descriptions of police services and activities appear to be the prime editorial content of the "Maine Trooper."

Public sale of such "handbooks" or "guidebooks" by the State Warden Service is specially authorized as an exception to 25 M.R.S.A. section 3702. What is really authorized is sale of warden "publications." Like the term "magazine," the terms "guidebooks" or "handbooks" have no special clearly definable meaning, separating one from the other.

The special "wardens" exception was enacted by P.L. 1983 c. 330 rather clearly in response to a plea from a specialized group for a special privilege. Considering the widespread presence of wardens and the broad law enforcement powers which wardens possess in Maine, enactment of this special privilege for wardens must be construed as a significant dilution of the concerns about the subtle coercion of solicitation expressed by the Legislature on enactment of the original law in 1977. Enactment of such special privileges for particular groups creates constitutional issues of equal protection and equal treatment when the law continues to be applied to other groups not benefiting from legislative exemption. See Article I section 6-A of the Maine Con-

stitution and the Fifth and Fourteenth Amendments of the United States Constitution.

If we assume, *for the purposes of this discussion only,* that the State could generally prohibit law enforcement officers from soliciting sales of magazines to promote public understanding of their profession, the special exception adopted by the Legislature in 1983 would present a severe problem for enforcement of that prohibition pursuant to section 3702. Where the State allows one speaker to exercise a right to speak—here State Wardens soliciting public sales of "guidebooks" or "handbooks" —the State cannot then deny another speaker similar rights without a substantial justification for differentiation between the speakers, *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed.2d 267 (1951).

Here the State law purports to grant wardens the right to sell their publication to the public while denying state troopers, and other law enforcement officers the same right. Considering the all encompassing justifications regarding subtle coercion asserted for the law in 1977, the Court can find no justification—let alone any substantial justification—for this apparent discrepancy in legislative treatment of two groups of law enforcement officers. Accordingly, the Court must declare that any application of the statute which would deny Maine State Troopers the right to sell publications to the public through third persons or through non-members who contact the Association would amount to unconstitutional disparate treatment of Maine State Troopers as opposed to Maine State Wardens. Similarly, enforcement of restrictions on advertising sales or disposition of proceeds which are more restrictive than those allowed to wardens would amount to disparate treatment of those similarly situated and thus application of the statute that is violative of Article I, section 6-A of the Maine Constitution.

Having decided that, as a matter of equal application of the laws, the members of the Maine State Troopers Association

may sell their publications to the same extent, and subject to the same restrictions, as State Wardens, the Court need not address the potentially very difficult issue of whether the State may constitutionally impose an absolute ban on sale of publications by law enforcement officers or law enforcement associations. The restrictions on sale of publications by wardens, essentially providing that sales to the public be through third-parties, avoids the coercive aspects inherent in direct sales by law enforcement personnel to members of the public which concerned the Legislature in the 1977 enactment. Such restrictions appear to be reasonable time, place, and manner restrictions on the sale and distribution of publications which promote the goals sought in the antisolicitation law, while at the same time not unduly restricting the ability of law enforcement officers and law enforcement associations to distribute their publications. Thus, law enforcement officers rights of expression under Article I section 4 of the Maine Constitution and the First Amendment of the United States Constitution can be protected. The enactment of the special privilege for wardens, and its necessary application to other law enforcement agencies under the equal access doctrine, would appear to have the unintended effect of shielding the Solicitation by Law Enforcment Officers Law at its potentially most vulnerable constitutional point, the otherwise absolute ban on sale of publications to the general public which existed prior to the special "wardens" amendment.

Accordingly, by this opinion, the Court is deciding:

1. The Solicitation by Law Enforcement Officers Law properly bans solicitation of advertisements from the general public by law enforcement officers or law enforcement associations. Thus, the State may properly act to prohibit solicitation of advertising by the Maine State Troopers Association that exceeds the types of advertising and solicitation allowed to wardens in the "wardens" exception to the Solicitation by Law Enforcement Officers Law.

2. The State may not properly prohibit sale or distribution of *The Maine Trooper*, or other publications of the Maine State Troopers Association, to the general public, except that the

State may impose the same limits on the manner of distribution as are imposed in the "wardens" exception to the law.

Both the State and the Maine State Troopers Association have sought injunctions in this matter. By this opinion, the Court has declared its view of the law in this area. In this case both the State and members of the Maine State Troopers Association are charged with enforcing and upholding of state laws. The law having now been declared, the Court presumes, absent evidence to the contrary, that the Court's declaration of law will be followed by the parties, subject, of course, to appeal rights. Because of the obligation and commitment of both parties to follow the law, the Court believes that issuance of an injunction either against the State or against the Defendant, at this point, would be an unnecessary act, and one the Court need not undertake, *Cf. American Trucking Association v. Quinn,* 437 A.2d 623, 627 (Me. 1981).

Therefore, the Court ORDERS and the entry shall be:

1. On the Complaint, judgment for the State that the Court declares that the restrictions on solicitation of advertising imposed in the Solicitation by Law Enforcement Officers Law are valid and enforceable against the Maine State Troopers Association, subject to the limited exceptions for solicitation of advertising allowed by the "wardens" exception to the law, as discussed in this opinion.

2. On the counterclaim, judgment for the Defendant Maine State Troopers Association that the Court declares that the Maine State Troopers Association may sell their publications to the general public subject to the same limits as are imposed on associations of State Wardens by 25 M.R.S.A. section 3702.

3. Except for the declarations of law stated herein, all other requests for relief made in the complaint and the counterclaim are denied.

Dated: September 6, 1984

DONALD G. ALEXANDER
Justice, Superior Court

JUDGMENT OR DECREE APPEALED FROM

The entire text of all decisions, opinions, findings and conclusions, including portions constituting the judgment, have been reproduced above. No rehearings were held, either in Superior Court or before the Law Court.

The caption of the case before the Law Court was:

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3798
Law Docket No. Ken-84-349

STATE OF MAINE

V.

MAINE STATE TROOPERS ASSOCIATION

Argued - March 12, 1985
Decided - April 18, 1985

Its Judgment was:
Judgment Affirmed

In the Superior Court, the caption was:

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-83-496

STATE OF MAINE,

Plaintiff

v.

OPINION and ORDER

MAINE STATE TROOPERS ASSOCIATION,

Defendant

Its judgment was:

1. On the Complaint, judgment for the State that the Court declares that the restrictions on solicitation of advertising imposed in the Solicitation by Law Enforcement Officers Law are valid and enforceable against the Maine State Troopers Association, subject to the limited exceptions for solicitation of advertising allowed by the "wardens" exception to the law, as discussed in this opinion.

2. On the counterclaim, judgment for the Defendant Maine State Troopers Association that the Court declares that the Maine State Troopers Association may sell their publications to the general public subject to the same limits as are imposed on associations of State Wardens by 25 M.R.S.A. section 3702.

3. Except for the declarations of law stated herein, all other requests for relief made in the complaint and the counterclaim are denied.

Dated: September 6, 1984

DONALD G. ALEXANDER
Justice, Superior Court

NOTICE OF APPEAL

IN THE SUPREME COURT OF THE
STATE OF MAINE

STATE OF MAINE,	)	
	)	
Appellee	)	
v.	)	
	)	
MAINE STATE TROOPERS ASSOCIATION	)	Law Docket No. Ken-84-349
Appellant	)	
v.	)	
	)	
JAMES TIERNEY,	)	
	)	
Appellee	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Maine State Troopers Association, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Maine Supreme Judicial Court sitting as the Law Court affirming the decision of the Maine Superior Court entered in this action on April 18, 1985.

This appeal is taken pursuant to 28 U.S.C. §1257(2). The portions of the decision appealed from are:

1. The holding that, despite a finding that solicitation activities are entitled to protections of the freedom of speech provisions of the United States Constitution, that 25 M.R.S.A. §3701 et. seq does not violate that United States Constitution.
2. That the State has a compelling interest in regulating all law enforcement solicitation.
3. That the statute in question is not overbroad.

4. That the statute in question is not void for vagueness.
5. That the statute does not deprive the Appellant of property without due process of law.
6. That the Appellant is not entitled to an attorney's fee pursuant to 42 U.S.C. §1988.

Dated at Portland, Maine this 13th day of May, 1985.

_____

John W. Chapman, Esquire
Attorney for Appellant
Maine State Troopers Association

RICHARDSON, TYLER & TROUBH
465 Congress Street
P.O. Box 15340
Portland, Maine 04101
(207) 774-5821

AFFIDAVIT OF SERVICE

I, John W. Chapman, state the following under oath:

1. I am of legal age.
2. I am an attorney admitted to practice in the State of Maine.
3. On May 13, 1985, I caused one copy of a Notice of Appeal to be served, by first class mail, postage prepaid, upon each of the following persons or entities:

   James Tierney
   State of Maine
   Clerk, Kennebec County Superior Court.
4. I also caused the original Notice and the original Affidavit to be filed with the Clerk of the Supreme Judicial Court, sitting as the Law Court, on May 13, 1985, by first class mail, postage prepaid.

DATED: 5/13/85

_____

John W. Chapman

STATE OF MAINE
CUMBERLAND, ss. May 13, 1985

Personally appeared the above John W. Chapman and made oath as to the truth of the foregoing statements made by him.

Before me,

_____

Notary Public
My Commission Expires: 3-30-92

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED IN JURISDICTIONAL STATEMENT

U.S. CONST., amend. I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. XIV §1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §1257, provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privi-

lege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Title 42 U.S.C. §1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 U.S.C. §1988, provides:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or Title 6 of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Title 25 M.R.S.A. ch. 403, provides:

§3701. Definitions.

As used in this chapter, unless the context clearly indicates otherwise, the following words shall have the following meanings.

1. Law enforcement agency. "Law enforcement agency" means any state, county, municipality or other political unit within the territory belonging to the State or any department, agency or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government that employs law enforcement officers.

2. Law enforcement association. "Law enforcement association" means a corporation, partnership, unincorporated association or any other legal entity, including a benevolent association, whose members are primarily law enforcement officers.

3. Law enforcement officer. "Law enforcement officer" means any person who by virtue of public employment is vested by law with a duty to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

4. Property. "Property" means any money, service, gift or anything of value, including a promise.

5. Solicit. "Solicit" means to request property. The word means and includes, but is not limited to, the following methods of securing property:

A. Any verbal request, including, but not limited to, a request that is made in person, by telephone or through any advertising media;

B. Any written request, including, but not limited to, a request that is sent, delivered or distributed or any advertisement posted in a public place or appearing in a newspaper, television or other advertising media; and

C. The sale of, offer or attempt to sell, any advertising, advertisements, advertising space, book, card, tag, coupon, ticket, device, magazine, membership, subscription or other tangible item or thing of value.

§3702. Solicitation unlawful.

No person may solicit property from the general public when the property, or any part of it, in any way benefits, is intended to benefit or is represented to be for the benefit of any law enforcement officer, law enforcement agency or law enforcement association, except that any state warden service association may offer for sale, by persons other than wardens or members of the association, to members of the public guide books or handbooks containing historical reviews or descriptions of services, except that on the request of a nonmember

of the association may provide that person with the copies requested for sale by that person. No advertisements may be sold or included in these publications, except greetings or complimentary statements from members or former members which shall give the full name of the member or former member. A stated rate for this advertisement space shall be published and no funds in excess of that stated rate may be accepted by the association for space.

A record of receipts and sales for space and sales of the publication shall be kept and available to the public during normal working hours.

All proceeds from these sales shall be expended for direct charitable services to members or their spouses, widows, children, widowers or parents and may not be used for buildings or equipment, construction or maintenance or entertainment of members.

Any violation of this chapter shall constitute a violation of Title 5, chapter 10, the unfair trade practices laws.

§3703. Exception for law enforcement officers elected to public office.

Nothing in this chapter shall prevent any person from soliciting funds to pay obligations incurred or about to be incurred in the furtherance of, or as the result of, a campaign by a law enforcement officer for public office.

85-72

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAINE STATE TROOPERS ASSOCIATION
Appellant

v.

STATE OF MAINE and JAMES E. TIERNEY
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE

MOTION TO AFFIRM OR DISMISS

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State of Maine

STEPHEN L. WESSLER
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August 30, 1985

BEST AVAILABLE COPY

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAINE STATE TROOPERS ASSOCIATION
Appellant

v.

STATE OF MAINE and JAMES E. TIERNEY
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE

MOTION TO AFFIRM OR DISMISS

Attorneys for Appellees:

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Motion to Affirm or Dismiss

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of Maine sitting as the Law Court on the grounds that it is manifest that the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

Questions Presented

I. Whether the Law Court correctly decided that the prohibition on solicitation by law enforcement officers and associations contained in the Solicitation by Law Enforcement Officers Act does not violate the rights of law enforcement officers under the First and Fourteenth Amendments of the United States Constitution.

II. Whether the Law Court correctly decided that Appellant was not entitled to recover attorneys' fees pursuant to 42 U.S.C. § 1988.

Statement of the Case

On October 25, 1983, the State of Maine filed a Complaint under the Solicitation by Law Enforcement Officers Act, 25 M.R.S.A. §§ 3701-3703 (Supp. 1984) (hereinafter referred to as the Act), and the Unfair Trade Practices Act, 5 M.R.S.A. §§ 206-214 (1979 & Supp. 1984)[1] against the Maine State Troopers Association (hereinafter referred to as MSTA) alleging violations of the Act. The Act prohibits any person from soliciting property from the general public when that property

[1] Pursuant to 25 M.R.S.A. § 3702 (Supp. 1984), a violation of the Act constitutes a violation of the Maine Unfair Trade Practices Act. Section 209 of the Unfair Trade Practices Act authorizes the Attorney General to seek injunctive relief against persons violating the Unfair Trade Practices Act.

will benefit, in any way, any law enforcement officer, law enforcement agency or law enforcement association. Specifically, the State alleged that the MSTA, an association consisting of troopers in the Maine State Police, sold advertising in a magazine published by the MSTA to members of the general public in violation of the Act.

The MSTA answered the Complaint denying that its sale of advertising violated the Act, requesting that the State's Complaint be dismissed on the grounds that the Act violated the First and Fourteenth Amendments of the United States Constitution and demanding attorneys' fees pursuant to 42 U.S.C. § 1988. The MSTA also filed a counterclaim alleging that the State's enforcement of the Act violated the rights of its members under the First and Fourteenth Amendments to the United States Constitution and seeking recovery of its legal fees pursuant to 42 U.S.C. § 1988. Subsequently, the MSTA added James E. Tierney, the Attorney General of the State of Maine, as a third party defendant to its Counterclaim.

After a hearing on a stipulated record, the Superior Court for Kennebec County issued a judgment holding that the Act constitutionally prohibited the solicitation of advertisements from the general public on behalf of law enforcement officers, agencies or associations. The Superior Court additionally ruled that the State could not impose greater restrictions on the distribution of publications and the sale of advertising than are imposed by the Act on state warden service associations. The Act creates a limited exception for the sale of advertising and the distribution of publications by state warden service associations. 25 M.R.S.A. § 3702 (Supp. 1984).[2] The Superior Court denied the MSTA's request for attorneys' fees pursuant to 42 U.S.C. § 1988. The MSTA appealed to the Law Court

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[2] The exceptions for state warden service associations, contained in 25 M.R.S.A. § 3702 (Supp. 1984) provides as follows:

> except that any state warden service association may offer for sale, by persons other than wardens or members of the association, to members of the public guide books or handbooks containing historical reviews

and the State of Maine filed a cross appeal with respect to the Superior Court's ruling barring the State from imposing greater restrictions on the MSTA than are imposed on publications issued by state warden service associations.

The Maine Supreme Judicial Court, sitting as the Law Court, affirmed the decision of the Superior Court. 491 A.2d 538 (Me. 1985). The Law Court concluded that, while the MSTA's solicitation activities were entitled to protection under the First Amendment, the Act was the least restrictive means of achieving the compelling governmental interest of prohibiting inherently coercive solicitations on behalf of law enforcement officers.

The Law Court affirmed the Superior Court's decision prohibiting the State from imposing any greater restrictions on the solicitation activities of law enforcement officers than are imposed upon state warden service associations, and, additionally, affirmed the Superior Court's denial of attorneys' fees to the Appellant pursuant to 42 U.S.C. § 1988. The Law Court concluded that the Association's affirmative defenses were adequate to protect the Association's civil rights and that "[t]he counterclaim added nothing, therefore we disregard it and view the MSTA as a defendant for purposes of this litigation." 491 A.2d 538, 544. Accordingly, under the rules set forth in *Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2 (1983),

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or descriptions of services, except that on the request of a nonmember the association may provide that person with the copies requested for sale by that person. No advertisements may be sold or included in these publications, except greetings or complimentary statements from members or former members which shall give the full name of the member or former member. A stated rate for this advertisement space shall be published and no funds in excess of that stated rate may be accepted by the association for space. A record of receipts and sales for space and sales of the publication shall be kept and available to the public during normal working hours. All proceeds from these sales shall be expended for direct charitable services to members or their spouses, widows, children, widowers or parents and may not be used for buildings or equipment, construction or maintenance or entertainment of members.

the Law Court denied recovery of attorneys' fees because the record contained no substantial evidence that the State instituted its suit for purposes of harassment or vexation.

Argument

The questions presented in this appeal do not raise any novel issues under federal constitutional or statutory law. To the contrary, the Law Court's treatment of Appellant's claims under the First and Fourteenth Amendments follow the unambiguous decisions of this Court. Accordingly, this appeal raises questions so unsubstantial as not to warrant further argument either by way of brief or oral argument.

This Court has recently held that solicitation activities are protected by the First Amendment of the United States Constitution. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, ____ U.S. ____, 104 S. Ct. 2839, 2849 (1984); *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 623 (1980). This Court, however, has also unequivocally held that the First Amendment does not provide an absolute and total protection for speech. Rather, as articulated by the Court in *Village of Schaumburg*, a restriction on activities protected by the First Amendment will be justified if the restrictions serve a strong governmental interest and if that interest could not be served by restrictions "less destructive of First Amendment interests". 440 U.S. 620, at 636.

The Law Court's decision in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act under the First and Fourteenth Amendments of the United States Constitution constitutes nothing more than an application of the clear principle set forth in *Village of Schaumburg*. The Law Court analyzed the legislative purpose supporting the Act and determined that the Maine Legislature sought to prohibit solicitations by law enforcement officers because such solicitations are "inherently coercive". As the Law Court concluded: "law enforcement solicitation erodes public confidence in the

integrity of law enforcement personnel. The State's interest in protecting the reputation of its law enforcement bodies is undeniably substantial. Indeed, we would be hard pressed to suggest a weightier interest." 491 A.2d 538, 542.

Additionally, the Law Court concluded that the Act constituted the least restrictive means with which to achieve its purpose: "Because at least the appearance of coercion inheres in every solicitation on behalf of law enforcement agents, and because that appearance undermines the integrity of the office, the State has a compelling interest in regulating *all* law enforcement solicitations." 491 A.2d 538, 542-43. (emphasis added).[3]

Similarly, Appellant's claim for attorneys' fees raises no substantial issue under federal law. The Law Court disregarded Appellant's counterclaim, concluding that "[t]he MSTA's affirmative defense was sufficient to protect their civil rights." 491 A.2d 538, 544. Accordingly, the Law Court followed this Court's decision in *Hensley v. Eckerhart, supra,* (holding that a prevailing defendant "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant") in ruling on Defendant's claim for attorneys' fees under 42 U.S.C. § 1988. The Law Court concluded, based on its analysis of the record, that no substantial evidence existed to indicate that the State had brought this action "for purposes of harassment or vexation". 491 A.2d 538, 544. The Law Court's application of *Hensley* does not raise a substantial issue requiring further briefing or argument.

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[3] The Law Court rejected Appellant's arguments on overbreadth, vagueness and due process. The Law Court's treatment of these issues clearly follows accepted authority and raises no novel or substantial issues under federal law.

Conclusion

Wherefore, Appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument and Appellees respectfully move this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the case by the Supreme Judicial Court of Maine sitting as the Law Court.

Respectfully submitted,

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